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PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. HOLLICE NEYLAND, Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from a judgment entered January 21, 1965 in the Circuit Court of Cook County upon a finding of guilty of the crimes of deviate sexual assault (Ill. Rev. Stat., 1963, c.38, §11-3) and indecent liberties with a child (Ill. Rev. Stat., 1963, c. 38 §11-4(2)). The appellant urges as grounds for reversing the judgment that the People were permitted to draw out the complaining witness' testimony through the excessive use of leading questions and that the complaining witness' testimony was not corroborated.

The complaining witness, Eloise Odam, was 13 years old at the time of the occurrence. She testified at the trial that she was on her way to the store on an errand for her mother when the appellant came up behind her with a kitchen knife in his hand and forced her to accompany him to a third floor apartment in a nearby building. This abduction occurred in the early evening hours. The witness also testified to certain deviate sexual conduct of the appellant that occurred during the course of the evening. She said the appellant permitted her to leave the apartment the following morning. She immediately went to a public telephone located nearby and called the police. While waiting for them, she saw the appellant leave the building where they had spent the night, and go into another building located on that same street. When the police arrived, she told them where the appellant went and gave them his description. The police went to that building and asked one of the tenants if anyone fitting that description lived there. That tenant said the appellant answered

the description. The complaining witness stood in front of a glass door as the appellant came down the stairs; the police stood to the side so that they would not be visible to someone answering the door. When the appellant came down the stairs, but before he opened the door, the complaining witness told the police that he was the man. The police ordered the appellant to open the door, which he did. He denied his guilt at the time he was arrested, and has denied his guilt at every opportunity since then.

The complaining witness' mother testified that when she saw her daughter that morning her daughter told her of the abduction and the deviate sexual conduct that had occurred during the night. The mother said her daughter had scratches on her neck and breast. A doctor also testified that the child had these scratches. According to this doctor the scratches were from 12 hours to three days old at the time he examined the girl. This examination took place more than 12 hours after the girl said she was abducted.

Della Brice testified that she was the manager of the building in which the complaining witness said the alleged offense took place. She said the appellant had come to her some hours before the girl said she was abducted, and asked to see an apartment on the third floor which was advertised as being for rent. Mrs. Brice said she gave the appellant the key, and that he went up to look at the apartment. He later returned the key to her and left. She did not check to see if he locked the door behind him. It is the People's theory that the appellant left the door to that apartment unlocked so that he could use the vacant apartment for the commission of the crime. They point out that the testimony of the complaining witness is corroborated by Mrs. Brice and by the testimony of the witnesses who said they observed scratches on her person.

The appellant took the stand in his own defense and testified that on the night in question he was playing checkers on

the front steps of the building in which he lives with a man known as "Big Jet." He also said that during the evening he went around the corner from where he lives to watch a fire. No other witnesses took the stand on behalf of the appellant.

We have carefully reviewed the transcript of the trial and find no excessive use of leading questions in the examination of the complaining witness. The girl was 14 years old at the time of the trial and was in an ungraded class at school. The transcript shows, for example, that during her testimony she had trouble telling her left hand from her right. Without some guidance by the counsel it would have been most difficult to elicit the evidence. The case was tried before a judge sitting without a jury and as he noted, "the Court recognizes questions of a leading nature."

"The propriety of allowing leading questions is within the sound discretion of the trial court, and is not a ground for reversal unless it appears that this discretion has been abused and has resulted in substantial injury to the defendant." People v. Brooks, 52 Ill. App.2d 473, 202 N.E.2d 265 (1964). There has been no showing that the Court below abused his discretion.

We also hold that there was sufficient evidence to sustain a conviction. The trial judge said at the time he made his finding he thought the girl made a good witness and that she told a clear and convincing story. Mrs. Brice said the witness had been in the apartment described by the complaining witness earlier that day and that he had an opportunity to leave the door unlocked. The girl had scratches on her neck and breast which indicated that the alleged offense took place. In fact, during the trial, the counsel for the appellant said he had no doubt that the offense did take place, and questioned only the identification of the appellant as the man who performed the acts complained of. We think the identification by this 13 year old girl, coupled with the testimony of Mrs. Brice is sufficient to establish the identity of the appellant as the man who performed the acts complained of. The judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, J., and BURKE, J., concur.

73 I.A. 2 62

49577

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT LEE SMITH, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of theft of an automobile and was sentenced to two to five years in the penitentiary. He appeals.

Shortly before 11:00 P.M. on September 4, 1963, Chicago Police Officers Watkins and Russell were cruising in a squad car in the 3000 block of South Michigan Avenue when they noticed the driver of a 1962 Cadillac attempt an illegal turn at 32nd Street. The officers attempted to stop the Cadillac, but it proceeded onto Indiana Avenue where it finally pulled to the curb. The squad car spotlight was beamed into the Cadillac on the faces of the driver and the passenger and the two men exited the automobile. Officer Watkins testified that he was sitting on the passenger side of the squad car and clearly saw the face of the driver of the Cadillac, whom he identified as the defendant. The officers exited the squad car and Officer Watkins stood facing defendant some six feet away. Defendant and his partner immediately got back into the Cadillac and proceeded on Indiana Avenue to 33rd Street where they pulled into an alley between Indiana and Prairie Avenues. The officers radioed a description of the two men to police headquarters and proceeded after the Cadillac. The two men again exited the Cadillac and ran into a gangway. They were seen later by Officers Watkins and Russell in the custody of Police Officers Olsen and Utter who stopped the two men at 35th Street between Indiana and Prairie Avenues for the reason that they fitted the description of the two men, received over their radio a short time before.

Officer Olsen testified he and Officer Utter were cruising on 35th Street in their squad car when they received the description of the two men over their radio. Defendant and his partner, Arnold Thomas, fitted the description and were stopped and questioned by the officers. Officer Olsen stated that both men were breathing heavily. The men were placed into the squad car and were driven to the site of the abandoned Cadillac, after which it was determined that the automobile was stolen.

Defendant testified in his own behalf and stated that he lived in the 3300 block of Indiana Avenue. During the day in question he and Arnold Thomas were at defendant's house, eating, drinking and listening to records. About 10:30 or 11:00 P.M. they went outdoors to get something to eat and noticed some excitement in the neighborhood. They stopped at a liquor store to purchase cigarettes and as they left the store they were stopped and questioned by Officer Olsen and taken to the place where the Cadillac was parked. On cross-examination defendant denied having told the officers that he was a user of narcotics and that he had used narcotics with Arnold Thomas just prior to the time they were arrested. On rebuttal, Officer Olsen testified defendant told him he was a narcotics user and had taken heroin with Arnold Thomas.

Defendant maintains that his guilt was not proven beyond a reasonable doubt due to the fact that Officers Watkins and Russell did not have sufficient opportunity to determine the identity of the occupants of the Cadillac and that he was denied a fair trial by virtue of the evidence concerning his use of narcotics. We disagree.

The testimony of one witness alone, if the testimony is positive and the witness credible, is sufficient to sustain a conviction even though the testimony is contradicted by the accused. People v. Miller, 30 Ill.2d 110; People v. Williams, 30 Ill.2d 166. A reviewing court will not substitute its opinion as to the cred-

ibility of evidence unless the proof is so unsatisfactory as to justify a reasonable doubt of guilt. People v. Boney, 28 Ill.2d 505. Officer Watkins testified that he observed the defendant and Arnold Thomas in the stolen Cadillac. The spotlight of the police car was trained on defendant and when the two men exited the Cadillac on Indiana Avenue, Officer Watkins was approximately six feet away from and looking directly at defendant. The wearing apparel of the two occupants of the Cadillac was described and substantially corresponded to that worn by defendant and Arnold Thomas when they were arrested by Officers Olsen and Utter. Officer Watkins again saw defendant some three minutes after the two men escaped into the alley. Defendant and Arnold Thomas' proximity to the area of the stolen automobile, the fact that they were stopped and questioned by Officers Olsen and Utter because they fitted the description of the two men which they had received over their radio, and the fact that the two men were breathing heavily at the time they were stopped and questioned, corroborate the testimony given by Officer Watkins. Contrary to defendant's contention, the evidence given by Officers Watkins and Olsen, together with other circumstances, clearly show that defendant's conviction rests upon clear and convincing evidence.

Defendant also maintains he was denied a fair trial due to the evidence concerning his use of narcotics. On cross-examination, defendant was asked whether he told Officer Olsen he was a user of narcotics and had used narcotics on the day in question in the presence of Arnold Thomas, which defendant denied saying. Officer Olsen testified in rebuttal that defendant told him he was a user of narcotics and that he was with Arnold Thomas on the night in question to use narcotics. Trial counsel made it clear the purpose of this evidence was for impeachment and consequently we do not feel that defendant was in any way prejudiced thereby. The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

49577

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT LEE SMITH, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MODIFICATION OF OPINION

MR. JUSTICE BURKE DELIVERED THE MODIFICATION OF THE OPINION OF THE COURT:

The last paragraph on Page 3 of the opinion is stricken, beginning with "Defendant also maintains he was denied a fair trial..." and ending with "...The judgment is affirmed." The following paragraph is inserted in its stead:

Defendant also maintains he was denied a fair trial due to the evidence concerning his use of narcotics. On cross-examination, defendant was asked whether he told Officer Olsen he was a user of narcotics and had used narcotics on the day in question in the presence of Arnold Thomas, which defendant denied saying. Officer Olsen testified in rebuttal that defendant told him he was a user of narcotics and that he was with Arnold Thomas on the night in question to use narcotics. We agree with defendant that the testimony regarding the use of narcotics by defendant was incompetent evidence. People v. Novak, 63 Ill. App.2d. 433, cited by defendant in support of this position, involved a trial before a jury and was otherwise a close case on the facts. The instant case, however, was a bench trial. It is well settled, in a bench trial of a criminal case, the trial judge is presumed to have considered only competent evidence in arriving at the judgment. People v. Robinson, 30 Ill.2d. 437. If it affirmatively appears that the trial judge considered incompetent evidence prejudicial to the defendant, the judgment will be reversed. People v. Grodkiewicz, 16 Ill.2d 192; People v. Smith,

55 Ill. App. 2d. 480, 488. We have reviewed the record and found that the trial judge did not give weight to the evidence relating to the defendant's use of narcotics in arriving at his judgment and that the evidence of defendant's guilt is otherwise clear and convincing. The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

50997

PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. ARCHIE TEYCIAL, (Impleaded) Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from a judgment entered in the Criminal Court November 21, 1957 upon a finding of guilty of the unlawful sale of narcotic drugs. (Ill. Rev. Stat., 1957, c. 38, §192.28-3). The only point raised by the appellant is that he was not proved guilty beyond a reasonable doubt in that the packets he sold contained narcotics.

We have read both briefs and checked the record carefully and find the appellant's contention to be without merit. The appellant traces the packets through various police officers to one Officer Epstein, and then says, "At this point we must only guess as to what happened to the packages....There is a conspicuous absence of any testimony describing the whereabouts of the packages between the time Officer Epstein took them and the time Officer McInerney received [the exhibit] from 'some sergeant' at the Crime Laboratory just prior to the trial." It is the appellant's suggestion, then, that the police may have run their test on a substance other than that which was sold by him.

The record shows, however, that there was a stipulation entered into at the trial by which it was agreed that the exhibit before the court was the same as that which was brought to the crime laboratory by Officer Epstein. The appellant is bound by this stipulation. People v. Polk, 19 Ill.2d 310, 167 N.E.2d 185 (1960), People v. Pygott, 64 Ill. App.2d 284, 211 N.E.2d 382 (1965). Since the lack of proof of which the appellant complains was covered by a stipulation, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

LYONS, J., and BURKE, J., concur.

10703

73 I.A. 2 907

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10703 Agenda No. 66-8

Carla Comerford, Administrator of the Estate of John V. Comerford, Deceased,

Plaintiff-Appellant

vs.

James A. Jones, Jr.,

Defendant-Appellee

Appeal from Circuit Court Sangamon County

CRAVEN, J.:

This was a suit for wrongful death brought by the administrator of John V. Comerford, deceased, on behalf of his estate, against the defendant, James A. Jones, Jr. The jury returned a verdict of not guilty, from which the plaintiff appeals.

The plaintiff asks for a new trial and assigns the following errors:

1. Prejudicial statements and argument to the jury with respect to testimony ruled incompetent.

2. The submission of improper interrogatories to the jury.

3. The admission of evidence relating to other accidents.

4. The verdict was against the manifest weight of the evidence.

The facts show that the plaintiff's decedent was alone and driving south on a county road, at approximately 6:50 p.m., on February 13, 1963. It was dark, the weather cold, and a light snow had fallen earlier in the day. The defendant, also alone, was driving west on a county road that intersected with the above road $2\frac{1}{2}$ miles east of Divernon in Sangamon County. No one witnessed the accident except the decedent and the defendant.

A deputy sheriff and state trooper investigated the scene of the accident and found skid marks in the southbound lane of traffic. The first skid marks measured 31 feet, interrupted by a 13-foot interval, and finally ended with an additional 14 feet of skid marks to the estimated point of impact. No skid marks were found in the defendant's westbound lane of traffic. The deputy sheriff estimated the point of impact to be 6 to 8 feet south of the center of the intersection.

The intersection was somewhat irregular due to a jog in the north-south road. Southbound travel was required to turn 6 to 8 feet to the left, or east, to continue through

the intersection. The east-west road was straight. There were no signs or traffic devices at the intersection and both views were unobstructed.

After the impact, the decedent's car moved 50 feet in a west-southwest direction and the defendant's car traveled 155 feet in a southwest direction over a plowed field. No opinion was given as to the relative speed of the two automobiles.

The plaintiff introduced testimony that tne decedent was a careful and prudent driver. The defendant was disqualified from testifying by motion of the plaintiff, pursuant to Section 2 of the Evidence Act (Ill. Rev. Stat. 1963, ch. 51, sec. 2). Therefore, the evidence surrounding the occurrence was entirely circumstantial.

The allegedly prejudicial statements and argument by the defendant's counsel are not preserved in this record. Neither opening statement nor closing argument was transcribed. The alleged statements were introduced into this record by affidavit of one of the plaintiff's attorneys. It, in substance, alleged that defense counsel stated that the defendant would testify that he observed the plaintiff's decedent approach the intersection at a high and dangerous rate of speed and that the defendant accelerated his auto, sounded his horn and flashed his lights to avoid the collision.

During the trial, the defendant attempted to testify but was excluded by reason of the provisions of Section 2 of the Evidence Act. However, after the close of the evidence, the affidavit relates that the defendant's counsel argued that the "facts were clouded by reason of the lack of evidence" and that the plaintiff would not allow the defendant to testify as to what actually occurred. No objection was made to these alleged statements at the time they were made. Neither the statements nor timely objections to them are properly a part of this record.

The plaintiff argues that the defendant and the court realized that such evidence and related inferences were incompetent, and that use was made of both the opening statement and closing argument to prejudice the jury and deny a fair trial. In support of this position, the plaintiff relies upon Belfield v. Coop, 8 Ill. 2d 293, 313, 134 N.E.2d 249, 259 (1956) and City of Quincy v. V. E. Best Plumbing & Heating Supply Co., 17 Ill. 2d 570, 162 N.E.2d 373 (1959). Even under this rule of law, the court must first determine whether the appellant was denied a fair trial.

The defense counsel filed an affidavit which denies the accuracy of the recollection of the plaintiff's attorney in his affidavit. We do not have in the record any means to resolve the conflict or to determine the impropriety of the alleged misconduct. We are unable to determine what was said,

whether it was objectionable and, more important, we are unable to determine whether its effect was so prejudicial as to deny the plaintiff a fair trial. If such statements and remarks were so prejudicial as to prevent a fair trial, it is inconceivable that some sort of protest or objection of record was not entered prior to submitting this case to the jury. A jury case is not tried by affidavit--neither can it be reviewed by affidavit. We must confine ourselves to the record made by the litigants during trial, and not rely upon individual adversaries' recollection of facts. In the case of Bartels v. McGarvey, 331 Ill. App. 275, 278 (73 N.E.2d 123, 124 (1947)), the same method was employed to review an alleged prejudicial argument.

> "The other assignment of error we do not believe is properly before us for consideration as a Court of Review. The argument now complained about, when made, was not objected to and no ruling of the Court obtained thereon and cannot be complained of at this time. It is sought to bring this matter before us for determination upon an ex parte affidavit filed by one of the attorneys for plaintiff. The alleged improper remarks of counsel in argument to the jury are not preserved in the transcript of the proceedings on the trial and will not be considered by this Court (People v. McDonald, 365 Ill. 233 /6 N.E.2d 182 (1936)/; People v. Ladas, 374 Ill. 419 /29 N.E.2d 595 (1940)/; People v. Ritcheson, 396 Ill. 146, 157 /71 N.E.2d 30, 35 (1947)/)."

The defendant submitted two interrogatories to the jury, one on negligence of the defendant and the other on contributory negligence of the plaintiff's decedent. The first interrogatory asked whether the plaintiff's decedent, John V.

Comerford, was in the exercise of ordinary care and caution for his own safety immediately prior to and at the time of the occurrence in question. The second interrogatory asked whether the defendant, James A. Jones, Jr., was guilty of negligence which proximately contributed to cause the occurrence in question. Both were answered, "No." The plaintiff objected to these two interrogatories at the conference on instructions. The basis for the objection is set forth as follows:

> "I don't believe that these Interrogatories are proper, as written. It's the office of an Interrogatory to impose upon the jury the duty of answering a question of ultimate fact which is determinative of one of the primary issues of the case. These Interrogatories do not deal with issues of ultimate fact, but with legal causes."

Both negligence and contributory negligence are questions of fact, rather than law, and their resolution adverse to the plaintiff is an ultimate determination of the issue of liability. It is not proper to ask for resolution of an evidentiary fact (King v. Ryman, 5 Ill. App. 2d 484, 125 N.E.2d 840 (1955), because its resolution must control the general verdict. Johnson v. Country Life Ins. Co., 284 Ill. App. 603, 1 N.E.2d 779 (1936). However, it has been held proper to propound to the jury the ultimate question of fact as to whether the defendant was guilty of malicious and wanton conduct. Patterson v. Dempsey, 2 Ill. App. 2d 291, 119 N.E.2d 516 (1954). These interrogatories were proper inquiries in light of the objection made at the conference on instructions.

Our Civil Practice Act provides that special interrogatories shall be tendered, objected to and ruled upon the same as instructions. (Ill. Rev. Stat. 1963, ch. 110, sec. 65.) The plaintiff now asserts other basis, upon appeal, as to the impropriety of these interrogatories. However, the plaintiff has waived these grounds by failing to specify them at the conference on instructions. Supreme Court Rule 25-1 (Ill. Rev. Stat. 1963, ch. 110, sec. 101.25-1).

> "Except for the particularly specified objections, if any, made at the conference, the party is considered as consenting by implication to the instructions and cannot later complain thereof: /Citing cases/."... Smelcer v. Sanders, 39 Ill. App. 2d 164, 173 (188 N.E.2d 391, 395 (1963)).

Since the jury's answers to these interrogatories were consistent with their verdict, we must conclude that they were proper.

The plaintiff also alleges that the defendant introduced inadmissible evidence of other accidents. The defendant argues that no objection was made and that any error was waived. The abstract fails to show any objection to the testimony or any ruling by the trial court. The abstract should be sufficient in order that the court of review need not resort to the record. Harris v. Annunzio, 411 Ill. 124, 103 N.E.2d 477 (1952); Russo v. Kellogg, 37 Ill. App. 2d 336, 185 N.E.2d 377 (1962); Husted v. Thompson-Hayward Chemical Co., 62 Ill. App. 2d 287, 210 N.E.2d 614, 618 (1965).

However, the plaintiff has alleged that she failed to receive a fair trial. In order to determine whether the plaintiff was so prejudiced, we have, of our own motion, resorted to the record. McKey v. McKean, 384 Ill. 112, 51 N.E.2d 189 (1943). The record discloses that the trial court sustained each objection raised by the plaintiff to the testimony and after a conference with the court outside the presence of the jury the defendant dismissed the witness. No motion to strike was made by the plaintiff.

Where a litigant is represented by competent and experienced counsel, and objections are not made, we must conclude that the choice was a conscious one weighing the possible prejudice of objecting in the presence of the jury against the prejudice of the objectionable matter itself. In retrospect, it is difficult for a court of review to conclude that error improperly preserved was prejudicial, and it is even more difficult to determine that the error was so prejudicial as to deny a fair trial.

Due to the circumstantial nature of the evidence surrounding this occurrence, we cannot conclude that this verdict was against the manifest weight of the evidence. The jury may well have concluded, under the circumstances, that the plaintiff failed to meet her burden with respect either to

the issue of negligence or due care.

For the reasons stated, the judgment of the circuit court of Sangamon County, entered upon the verdict of the jury, is affirmed.

Judgment affirmed.

TRAPP, P.J., and SMITH, J., concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10686 Agenda No. 66-18

The People of the State of Illinois, Plaintiff-Appellee, vs. Carl R. Tucker, Defendant-Appellant	Appeal from Circuit Court McLean County

TRAPP, P. J.

Petitioner appeals from the order of the trial court denying his petition for discharge filed under the provisions of the Act relating to sexually dangerous persons, Chap. 38, §105, et seq. (Ill. Rev. Stat.).

Petitioner, represented by the Public Defender as court appointed counsel, contends that the evidence upon the hearing established that the petitioner was no longer a sexually dangerous person, and that the court erred in restricting and limiting relevant information submitted by the appellant during the course of the hearing.

While the petitioner was present in court at the hearing, the evidence was limited to a special progress report relating to petitioner, prepared by Dr. Grove Smith,

and dated some six days prior to the hearing, and the testimony of Dr. Smith who was called as the court's witness.

It is contended that Dr. Smith stated that petitioner was, as of the time of the hearing, no longer a sexual deviate by reason of the supervision in the institution, and that the doctor acknowledged that the petitioner was not always under supervision so that there was opportunity for the sexual deviate acts, but that no such acts were known, or had been reported, to Dr. Smith.

This interpretation of the evidence must be considered in the context of all of the evidence submitted to the court. The psychiatric progress report notes a suicide attempt by petitioner in February before the hearing in June; that petitioner was emotionally retarded in his ability to meet social situations at the institution, although there had been "increasing stabilization" as a result of medication. While there was no knowledge or report of homosexual interest, this was deemed secondary to the medication. Petitioner had continued his work in school, and Dr. Smith's testimony reflects that he had progressed from the third grade to the seventh grade with marks in accord with his level of intelligence, noted as dull normal. The report notes that petitioner's contact with reality, particularly in a free community, was tenuous, and there is a statement that his problems in the past were not helped by early returns to community placement.

The significance of this comment is not developed in the evidence as shown by the abstract. The report concludes that the wisdom of a conditional discharge was doubtful.

Upon testifying as a witness as upon cross-examination, Dr. Smith made reference to the act of the petitioner in fighting with the guards as evidence of an unwillingness to follow the rules and regulations, which made him believe that petitioner was still sexually dangerous. Dr. Smith also testified that the homosexual tendency arose as a result of nervous tension and anxiety, which was relieved by the medication administered and caused his improvement on the institutional level.

The contention, made in behalf of the petitioner, that the court erred in restricting and limiting information submitted by the appellant, does not seem to be borne out by the record as reflected in the abstract.

It appears that counsel, taking as a premise that the evidence showed that petitioner was no longer sexually dangerous, sought to interrogate the witness, Dr. Smith, as to whether petitioner should be transferred to a non-penal institution for treatment of his apparent mental condition. It appears from the abstract that, at this point in the examination, the court did interrupt to say that the only issue involved was the question of whether petitioner had recovered and suggested that this was a side issue. It does not appear that

an objection was made, or that the court excluded any evidence in the record, but rather indicated that the examination should be limited to things said within the progress report.

We cannot find, as a matter of fact, that thereafter counsel was limited, as in response to questions set out, Dr. Smith testified as to his opinion that petitioner would be sexually dangerous were he to return to a free community, and, thereafter further testified that petitioner, in the opinion of the witness, was not in a condition to be returned to a non-penal institution, or returned to society as recovered, as he had not shown any ability to meet situations either within the penal institution or within other institutions. Subsequently, Dr. Smith testified that "supervision" included the administration of the medication which, in his opinion, should not be administered outside of institutions. It thus appears that the matters challenged by counsel as a limitation upon examination of the court's witness, were actually placed into the record so that it is not necessary to pass upon the issue as to whether or not the examination was improperly limited to the psychiatric progress report.

Upon the evidence presented upon this appeal, we cannot say that the order of the trial court was contrary to the manifest weight of the evidence, and such order is accordingly affirmed.

Upon motion made while this appeal was pending we entered an order directing the Treasurer of McLean County to

pay the costs of the reporter proceedings to the court reporter. An objection to such order was taken with the case.

The essential protection of a criminal trial must be provided for an indigent petitioner under the statute relating to Sexually Dangerous Persons, Chap. 38, §105, et seq. (Ill. Rev. Stat., 1963), and the denial of a petition for discharge under the Act is an appealable order. People v. Olmstead, 32 Ill.2d 306; 205 N. E.2d 625.

Supreme Court Rule 27 (9)(b) provides that if the judge finds that the defendant is without financial means with which to obtain the report of proceedings at his trial, he shall order the court reporter to transcribe an original and copy, the original of the report to be certified by the reporter and filed with the Clerk of the trial court, while the copy should be certified and delivered to the defendant without charge.

Chap. 37, §163f4 (Ill. Rev. Stat., 1965) provides for the compensation of court reporters where transcripts are furnished to indigents, in the following language:

> " All such fees shall be paid out of the State Treasury on the warrant of the Auditor of Public Accounts, from appropriations made for such purpose, upon presentation of a certificate signed by the presiding judge setting the amount due said reporter. ....."

It appears that the statutory authority of this court is limited to the order of the payment of "out of pocket expense"

incurred on appeal by appointed counsel for indigent incarcerated defendants, Chap. 34, §5609 (Ill. Rev. Stat., 1965).

Accordingly, the order of this Court directing the Treasurer of McLean County to pay the fees of the reporter for the transcript in this cause is vacated and the cause is remanded to the trial court for purposes of making the certification of the reporter's fees as provided by statute.

Affirmed and Remanded with instructions concerning costs.

SMITH and CRAVEN, JJ., concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10569 Agenda No. 66-14

The People of the State of Illinois, Plaintiff-Appellee vs. Junior Lee Blanchett, Defendant-Appellant	Appeal from Circuit Court Adams County

CRAVEN, J.

On the original appeal, this Court passed upon the sufficiency of the indictment in this case. People v. Blanchett, 55 Ill. App. 2d 141, 204 N.E.2d 173. The Supreme Court allowed leave to appeal, reversed the determination of this Court that the indictment was invalid and remanded the cause to this Court for consideration of errors assigned on the appeal and not reached in our earlier decision.

The defendant was convicted at a bench trial on an information charging armed robbery. He was sentenced from two to five years in the Illinois State Penitentiary. The facts

show that George Cavanaugh was robbed in his apartment in Quincy, Illinois, on January 15, 1964. Present at the scene were Randy Hillman, John Tillery and the defendant. The defendant helped tie the victim to his bed, although he claimed he was required to do so by Randy Hillman who was armed. The defendant testified he had no knowledge of the robbery until he arrived at the victim's apartment.

The defendant went to an apartment rented by Patricia West. There the proceeds of the robbery were divided. The defendant then went to Hannibal, Missouri, with the above individuals to establish an alibi. The next day the defendant took a three-day trip to Texas and part of the stolen items were pawned to pay for the gasoline.

Patricia West testified for the State and claimed she had a conversation with the defendant in the presence of Bruce Woosley, Randy Hillman and John Tillery about setting up George Cavanaugh for a robbery. She was to get the victim drunk and go with him to his apartment. The defendant, Randy Hillman and John Tillery were to commit the robbery and split the proceeds. West testified she did not set up the robbery. However, she stated the three returned to her apartment and divided the loot consisting of a wallet, razor, wrist watch and clock. Both Woosley and Tillery denied the conversation with West and the defendant. The witness West's testimony was

impeached by the defendant's appointed counsel, the public defender for Adams County, when he took the stand and testified that the witness had made contradictory statements to him prior to her testimony. Hillman did not testify.

[1] The defendant contends that the evidence is insufficient to support a conviction in that the State failed to prove him guilty beyond a reasonable doubt. In that connection the defendant contends that Patricia West was an accomplice and that her testimony should be accorded little weight. People v. Mullins, 28 Ill. 2d 412, 192 N.E.2d 840 (1963). The facts in this record do not warrant the conclusion that this witness was an accomplice. She was in no way legally accountable for the commission of the crime as defined under our accessory statutes (ch. 38, secs. 5-1, 5-2, Ill. Rev. Stat. 1963). She expressly refused to participate in the crime. There is no independent evidence in the record to contradict her testimony as to her involvement "before or during the commission of an offense." (Ch. 38, sec. 5-2(c), Ill. Rev. Stat. 1963.)

[2,3] Even if the witness West could be characterized as an accomplice, the test in Illinois is whether or not evidence is sufficient to prove the defendant guilty beyond a reasonable doubt.

> "In a further attack upon the sufficiency of the proof, defendant urges that the testimony of Donel is entitled to little weight because it was that of a confessed accomplice

> given in the hope of reward in the form of lighter punishment for himself. While we have frequently stated that the uncorroborated testimony of an accomplice is attended by infirmities which require the utmost caution, it has always been the rule in this jurisdiction that such testimony is sufficient to convict if it satisfies a court or jury, as the case may be, beyond a reasonable doubt. (People v. Baker, 16 Ill.2d 364 [158 N.E.2d 1 (1959)]; People v. Nitti, 8 Ill.2d 136 [133 N.E.2d 12 (1956)]; People v. Hermens, 5 Ill.2d 277 [125 N.E.2d 500 (1955)].)"... People v. Wysocki, 20 Ill. 2d 62, (169 N.E.2d 264 (1960)).

[4] The circumstantial inferences arising from the facts not in dispute, in addition to the testimony of Miss West, are sufficient to allow the trial court to conclude that the defendant was proven guilty beyond a reasonable doubt.

[5] Finally, the defendant argues that the state's attorney materially prejudiced him in making certain arguments to the court. These arguments involve the State's interpretation of the legal effect of the defendant's statement. It must be noted that this was a bench trial and that arguments of counsel, either as to the law or to the facts, are not evidence and that it is presumed that the court, sitting without a jury, will consider only proper evidence and disregard all improper remarks and arguments of counsel. People v. Wysocki, 20 Ill. 2d 62, 169 N.E.2d 264 (1960).

We find that the defendant was not prejudiced and was proven guilty beyond a reasonable doubt. Therefore, the

judgment and sentence of the circuit court of Adams County is affirmed.

Affirmed.

TRAPP, P.J., and SMITH, J., concur.

NO. 65-123

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. RICHARD GOODRICH, Defendant-Appellant.	Appeal from the Circuit Court of Lake County.

MR JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This appeal is prosecuted from a judgment order of the Circuit Court of Lake County entered on May 4, 1965, the verdict on which the order was based, and the jail sentence imposed.

On September 15, 1964, a three-count information was filed by the States Attorney of Lake County charging the defendant, Richard Goodrich, with the offense of battery on the persons of three police officers of the City of Winthrop Harbor in violation of Section 12-3, Chapter 38 of the Illinois Revised Statutes (1963). Goodrich entered

a plea of not guilty and the cause was placed on the November criminal trial call. The matter was continued from time to time, first on the motion of the State and thereafter because Goodrich was apparently in a hospital. On February 10, 1965, the cause was placed on the March criminal call and on March 16 called for trial. On that date, Goodrich, through his attorney, moved for a continuance based on the fact that a material witness was unavailable and his defense would be prejudiced by his absence. The court denied the motion and assigned the case to a magistrate for an immediate trial. The same motion was made, and denied, by the magistrate and a trial by jury held on March 16 and 17. A motion for a directed verdict was denied and the jury found Goodrich guilty on one count, not guilty on the others. Post trial motions were denied and Goodrich was sentenced to 60 days in the County jail.

The battery charge was based on an altercation that occurred on September 6, 1964. The police officers testified that on that occasion they sought to arrest Goodrich for other offenses and approached him in a parking lot of a Winthrop Harbor restaurant for that purpose. They stated that they were in uniform and that the police chief displayed to Goodrich a warrant for his arrest, and directed him to "come along peacefully". The chief reached out to effect his arrest when Goodrich struck him violently to the ground. The other officers responded to the attack on the chief and were themselves assaulted in the general scuffle.

The testimony of Goodrich is substantially different. He stated that the three policemen surrounded him in the parking lot with no explanation and began to "jerk" and "grab" him "with force". He

testified that they had no warrants and would not inform him of the charge against him. When he resisted their efforts and attempted to defend himself, they forced him to the ground and struck him with a club. At the time of this melee, Goodrich was accompanied by another man. All of the officers testified as to his presence but were unable to identify him. He took no part in the fight but witnessed it in it's entirety. It was this man, one Orville Morris, who was to testify on behalf of Goodrich.

Goodrich was informed by his attorney on Saturday, March 13, that the trial would begin on the following Tuesday, March 16. According to Goodrich, he then attempted to contact Morris but learned that he had moved from Blackhawk Island in Rockford, his former residence, because of flood conditions. Morris had no phone or other known place of residence or business. The mother, brother, and brother-in-law of Morris all informed Goodrich that he had left the island because of the flood but were unaware of his present residence.

Goodrich had contacted Morris on only one occasion subsequent to September 6 and advised him "to keep in touch" since his testimony was necessary for his defense. Morris assured Goodrich that he would testify since he was, in Goodrich's words, his "star witness".

Goodrich here urges that the trial court committed reversible error in its denial of his motion for a continuance to permit him to locate his witness. He relies on Section 114-4 of the new Code of Criminal Procedure (Illinois Revised Statutes, Chapter 38, Section 114-4) which provides in part, as follows:

> "(a) The defendant or the State may move for a continuance. If the motion is made more than 30 days after arraignment, the court may require that it be

supported by affidavit.

(b) A motion for continuance made by defendant more than 30 days after arraignment may be granted when: . . . .

(3) A material witness is unavailable and the defense will be prejudiced by the absence of his testimony, provided, that this shall not be a ground for continuance if the State will stipulate that the testimony of the witness would be as alleged; . . . . . "

No affidavit was filed to support the motion of Goodrich for a continuance but this alone would not preclude his present contention inasmuch as the necessity for an affidavit is left to the discretion of the trial court. We also agree with Goodrich that Morris was, in all probability, a material witness to his defense. However, Section 114-4 also provides:

"(e) All motions for continuance are addressed to the discretion of the trial court and shall be considered in the light of the diligence shown on the part of the movant . . .

(g) This Section shall be construed to the end that criminal cases are tried with due diligence consonant with the rights of the defendant and the State to a speedy, fair and impartial trial."

The cases in Illinois have long held that the trial court has the discretion to grant or deny a motion for a continuance and the Code merely restates the law in this respect. The People v. Kees, 32 Ill. 2d 299, 303; People v. Hannah, 54 Ill. App. 2d 218, 222.

We do not feel that the trial court abused its discretion in this instance. We cannot say that the record indicates that Goodrich exercised sufficient diligence to insure that his witness would be available to testify. Although he was only informed on March 13 by his attorney that the trial would commence on March 16, he knew for

at least one month prior that the trial would be held sometime in March. He apparently made no effort to contact Morris until the last possible moment although it was clear to him that Morris would be his only witness.

The record also indicates that there was little expectation that Morris would be available to testify at any time in the immediate future. His brother-in-law stated to Goodrich that to locate him would be "like trying to find a needle in the haystack, and maybe worse.." It has been held that a motion for continuance on the grounds of absence of a material witness is properly denied unless there is some indication of a reasonable probability that the witness will be available in the foreseeable future. People v. Turner, 265 Ill. 594; People v. Donaldson, 255 Ill. 19. The State, as well as the accused, has a right to a speedy and impartial trial. When we consider the gravity of the offense here charged, the diligence of the defendant to prepare for trial, and the unlikelihood that the witness would be available in the reasonably near future to testify, we cannot conclude that the trial court was in error when it denied defendant's motion for a continuance.

For the reasons stated, the order of the Circuit Court of Lake County will be affirmed.

AFFIRMED.

Moran, P. J. and Davis, J. concur.

July 20, 1966

73 Ill. App. 2d 208

NO. 65-107

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

GERALD COLE and ALMEDA COLE, Plaintiffs-Appellees, vs. WILLIAM WILLHOFT and BETTY WILLHOFT, Defendants-Appellants.	Appeal from the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. Honorable Michael Kinney, Trial Judge.

Per curiam:

Defendants appeal from the decree of the Circuit Court of Madison County, Illinois, enjoining them from "interfering with, or obstructing in any manner " a strip of land described in the decree. No appearance was made, nor brief filed, by the plaintiffs.

When the party who prevails in the trial court does not appear or file a brief, this court is authorized to reverse and remand the case without further consideration or discussion, East Side Health District v. Village of Caseyville, 38 Ill. App. 2d 438. The issues here presented are complex and involve questions of adverse possession and an alleged easement. Since plaintiffs did

not see fit to file a brief to aid the court in the decision of the appeal, we invoke the above stated rule and reverse the decree.

The decree is reversed and the cause remanded to the Circuit Court of Madison County with directions to dismiss the cause.

Judgment Reversed and
remanded with directions.

PUBLISH ABSTRACT ONLY

50775

THE PEOPLE OF THE STATE OF ILLINOIS Appellee vs SYLVESTER HUBBARD, JR. Appellant	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from judgments entered September 8, 1964 in the Circuit Court of Cook County upon a verdict of guilty on two indictments for the crime of rape. (Ill. Rev. Stat.,1963, c. 38, §11-1) The appellant's theories of the case are that the evidence does not establish his guilt beyond a reasonable doubt, and that the trial court was in error in not giving the jury a complete instruction explaining the consent element in rape when it was not requested.

The people's evidence consisted of the testimony of a police officer and the two women who said they were raped by the appellant. The first to testify was Blanche Jeffries. She said that on January 30, 1964, the date of the alleged rapes, she lived in a basement apartment at 7130 South Carpenter in the City of Chicago. The premises consisted of a two-story residence with a basement. Also living in that building were Mrs. Newsome and her daughter, Mrs. Boyd, who occupied the first floor, and Carelle Drake, the other complaining witness and her daughter, who occupied the second floor apartment. The evidence shows that Mrs. Jeffries had three children and Mrs. Boyd had four children, all living in this building on the date in question.

Mrs. Jeffries stated that she saw the appellant in the building during the day the rapes allegedly took place. She said she knew him and had seen him there on previous occasions. The witness

testified that she was on the first floor visiting with Mrs. Boyd and that at various times the appellant came in to the apartment to borrow a needle and thread and some nail polish.

Mrs. Jeffries stated that at 3:30 or 4:00 p.m., the appellant came into the first floor apartment with a rifle. She said the women admired the weapon and called Mrs. Newsome in to see it. She then said the appellant forced her to go to the second floor apartment at rifle point and began to rape her. The witness said she pleaded with him not to have intercourse with her and told him she had an infection. The appellant ignored her pleas. While the appellant was raping this witness, a key was heard in the door. The witness said the appellant told her to get dressed and went downstairs to see who was there, taking the rifle with him. This witness remained on the second floor.

It was Carelle Drake who had come in. She went up to the second floor -- that being her apartment. The appellant told Mrs. Jeffries to tell Mrs. Drake what was happening and then bound Mrs. Drake with belts while he took Mrs. Jeffries back into the bedroom where he again raped her. According to the testimony, he then tied up Mrs. Jeffries and raped Mrs. Drake. Then, according to this witness, all of them went down to the basement apartment where they were joined by the children. They were there for about an hour. What transpired during that time is not revealed.

Mrs. Carelle Drake testified and supported the evidence given by Mrs. Jeffries as to what transpired after she entered her second floor apartment.

A Chicago Police Detective, Peter Vander Kamp, testified that he conducted a line-up the evening of January 30, 1964 at about 11:00 p.m. He said that the two complaining witnesses identified the appellant from a group of four men as the man who raped them. This witness further testified that he told the appellant

that the women had accused him of rape and that the appellant responded, "Yes, I did it."

There were no witnesses for the defense. The appellant was offered counsel, but refused all legal assistance. He conducted no cross-examination and did not take the stand in his own behalf.

The appellant here argues that the testimony given by the two complaining witnesses was inherently incredible. He points out that there was no explanation given concerning the presence of the appellant in the building that day. He asks why, in view of the fact that Mrs. Jeffries was marched to the second floor at gun point, Mrs. Newsome or Mrs. Boyd did not call the police. He asks why Mrs. Jeffries made no attempt at escape when she was left on the second floor when the appellant went to see who had come in. He further points out that no explanation was offered as to what transpired in the basement for one hour after the alleged rapes took place.

We agree that the testimony given by these ladies is inherently weak, and we would reverse this judgment were it not for the testimony of the police officer. That officer testified that the appellant had orally confessed to the crime of rape. No claim has been made either at the trial or in this court that the confession was not made, or if made, was not voluntary. Here, the confession alone is sufficient to sustain the conviction. People v. Guido, 321 Ill. 397, 152 N.E. 149 (1926), People v. Smith, 27 Ill.2d 344, 189 N.E.2d 257 (1963). A voluntary confession by a competent person is the highest type of evidence known to the law. People v. Green, 17 Ill. 2d 35, 160 N.E.2d 814 (1959).

"On motion of a defendant in any criminal case made prior to

trial the court shall order the State to furnish the defendant with a copy of any written confession made to any law enforcement officer of this State or any other State and a list of the witnesses to its making and acknowledgment. If the defendant has made an oral confession a list of the witnesses to its making shall be furnished." (Ill. Rev. Stat., 1963, c.38, §114-10(a)) In this case, no list seems to have been made available to the appellant, but the record does not show that any such request was made. The failure to furnish such a list is not error where it does not appear that any request for it was made, and no objection was made at the trial. People v. Seno, 23 Ill. 2d 206, 177 N.E. 2d 843 (1961). There was sufficient evidence for the jury to find the appellant guilty of the crimes for which he was indicted. People v. McKinzie, 18 Ill. 2d 44, 163 N.E. 2d 1 (1959).

The appellant offered no instructions at the trial. The jury was instructed regarding the crime of rape in the language of the statute, which definition includes the phrase "by force and against her will." The judgment is affirmed.

JUDGMENT AFFIRMED

Lyons, J. and Burke, J. concur

50666

VIOLET CROSS, Plaintiff-Counter Defendant, Appellant, vs. PAUL CROSS, Defendant-Counter Plaintiff, Appellee.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE KLUCZYNSKI DELIVERED THE OPINION OF THE COURT.

Although Violet Cross is designated in this appeal as "Plaintiff-Counter-Defendant, Appellant," it is brought by Edward Stasukaitis, an attorney, who represented her during a period of her divorce action. The attorney, hereinafter referred to as petitioner, appeals from an order denying his petition for fees and expenses.

The petitioner represented Violet Cross from January 17, 1961 to December 15, 1964. The record discloses that in October 1962 a decree of divorce was entered in favor of Paul Cross, and Violet, through the petitioner, prosecuted an appeal. The appellate court reversed and remanded the matter for retrial on October 13, 1963. Petitioner, on January 28, 1964, filed a petition in the name of Violet Cross, his client, for fees and costs involved in the appeal. This petition remained undisposed of during the re-trial proceedings of the divorce action. On November 23, 1964 petitioner filed a "Petition for Substitution of Attorneys and to Determine Compensation of Replaced Attorney" wherein he stated that he was notified by Violet Cross that she was desirous of retaining other counsel; that he was entitled to compensation for services rendered and moneys expended and that "he was unable to arrive at a mutually satisfactory basis for such compensation." He further

alleged that there was a hearing "to be completed" (evidently regarding the petition filed January 28, 1964) wherein the court heard testimony that $3000 was a just and reasonable fee for his services in prosecuting the appeal. He set forth the nature of all of his services and the hours involved, and charged that he expended the sum of $804.12 in behalf of his client "which the said Violet Cross promised to pay and has refused to pay." He estimated that the reasonable value of all his services prior to the appeal, during the appeal and since the mandate issued, to be $4500. He alleged that he received $500 from his client and that the appellate bill of costs in the sum of $186.40 was paid by Paul Cross. He therefore prayed he be allowed $4618 as fees and costs and be allowed to withdraw as attorney. The petition was amended setting forth the same facts except that he received $250 as temporary fees and defendant paid the sum of $186.40 appellate court costs. He prayed for an allowance in the sum of $4868 for fees and expenditures.

Defendant, Paul Cross' answer to the petition set forth that the evidence (previously adduced) indicated that he was physically and mentally incapable of gainful employment and that plaintiff, Violet Cross, was liable for her own attorney's fees. His answer to the amended petition alleged that she was employed, had assets of her own, was expecting a large inheritance from her father's estate, and was well able to pay the expenses involved.

Before disposition of the matter of the petitions, Violet Cross, represented by substitute counsel, obtained a Decree for Divorce on December 29, 1964 wherein it provided that she receive $4000 in lieu of alimony and all other claims and that Paul Cross pay the sum of $30 per month for the support of the sixteen year

old daughter "based upon his representation that the only income he has is a government allotment consisting of $77 per month." It further provided that defendant pay to plaintiff's substituted counsel the sum of $1000 "said fees to be in addition to any fees heretofore contracted by the plaintiff," and provided that the hearing on the "Petition of Edward Stasukaitis for Attorney's Fees and Court Costs" be continued.

In the final hearing on January 13, 1965, Violet Cross testified that she received the $4000 property settlement; that she did receive $25 per week (under a previous order) for child support from January 1961 to December 1964; that she had paid petitioner $550 in fees; and that in the period from January 1961 to December 1964 she was employed for 16 months as a beautician at a salary of $40 per week.

Paul Cross testified that he was on government pension of $77 per month; that he paid the $4000 to plaintiff and the $1000 to her attorney with funds borrowed from his mother and sister, with whom he lived; that he paid plaintiff's attorney temporary fees in the aggregate of $400 and paid the appellate court costs of $186.40; that he held certain real estate in trust and subsequently transferred it into a land trust wherein his mother and sister held the beneficial interest.

The court denied petitioner's application for assessment of attorney's fees and expenses against the defendant holding that although petitioner was entitled to be compensated, he failed to show that his client, Violet Cross, was without funds to "defend herself, protect herself" or was financially unable to pay her own attorney's fees. In connection with the disposition of petitioner's motion to vacate the court's order, it was further established that

Violet Cross had paid her substituted counsel an initial retainer of $1000.

The matter was tried on the basis that the petitioner was seeking an order requiring the defendant, Paul Cross, to pay the fees of and costs expended by petitioner as attorney for Violet Cross. We consider it so on appeal.

In Jones v. Jones, 48 Ill. App.2d 232, 198 N.E.2d 195 (1964), the court said (p. 238):

> The courts of Illinois have long held that in order to justify an allowance to a wife in a divorce action of attorney's fees from the husband, it is necessary that the complainant make a proper demand for such fees, show that she is financially unable to pay them herself and that her husband is able to do so [citing authorities].

The court then quoted the following from Arado v. Arado, 281 Ill. 123, 129, 117 N.E. 816, 818 (1917):

> ...solicitors fees are not allowed as a matter of right but rest in the sound discretion of the court, dependent on the inability of the complainant to provide for herself and pay the expenses of the litigation and upon the ability of the defendant to do so. The discretion is to be exercised in view of the conditions and circumstances of the case....

Applying these established principles of law to the instant case, we find that the trial court had sufficient grounds, conditions and circumstances before it to substantiate its ruling and we are of the opinion that there was no abuse of the court's discretion in this regard. The judgment is affirmed.

AFFIRMED.

MURPHY and BURMAN, JJ., concur.

Abstract only.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10680 Agenda No. 66-26

Wendell W. Diez, Plaintiff-Appellant vs. Mary Lou Diez, also known as Mary Lou Boyer, Defendant-Appellee	)	Appeal from Circuit Court Sangamon County

CRAVEN, J.:

The plaintiff, Wendell W. Diez, commenced this action by filing a complaint to annul an alleged marriage between the parties. The defendant, Mary Lou Diez, counterclaimed for separate maintenance and for child support for a daughter allegedly born of this marriage as well as for payment of certain bills, attorney's fees, costs and other relief. This appeal is from a decree denying the annulment, granting separate maintenance and other relief. Four separate notices of

appeal have been consolidated into this one proceeding.

A brief recitation of the factual background indicates the plaintiff to be 42 years of age and to have been married previously. The defendant was 32 years of age and, likewise, had been married previously. These parties first met sometime in 1959, at which time they began dating, and in the latter part of that year became engaged. The engagement was terminated sometime in December of 1959 or January of 1960. The defendant returned an engagement ring to plaintiff. Thereafter, in 1960, the defendant married a man by the name of Boyer, and that marriage was terminated by his death in 1962.

In October of 1963 the parties again started dating. They were together frequently in various places of entertainment in Sangamon County on week ends during the months of October, November and December of 1963 and January of 1964.

The testimony of the defendant discloses intercourse between the parties in November and December of 1963 and January and February of 1964. According to the defendant, she informed the plaintiff, about February 5, 1964, that she was of the opinion that she was pregnant. There is much conflict in the testimony as to the subsequent events. The uncontradicted evidence, however, discloses that on the 17th

of February, 1964, the parties went to a doctor in Springfield for blood tests in preparation of marriage. On February 21, 1964, at Granite City, Illinois, the parties were married. They spent two nights in motels in the Granite City area, then returned to Springfield. Plaintiff refused to cohabit with the defendant thereafter. The child was born in October of 1964.

This action was initiated in April of 1964. An amended complaint was filed in January of 1965. The cause was heard for three days in January of 1965, and on February 25, 1965, a decree was entered finding the issues against the plaintiff as to the annulment and in favor of the defendant on her counterclaim for separate maintenance. The decree included provisions for separate maintenance, child support, attorney's fees, and ordered the plaintiff to pay certain medical, drug and hospital bills. A post-trial motion was filed and denied by the court on April 13, 1965, the date of the filing of the first notice of appeal. A supersedeas bond in the amount of $3500.00 was filed and approved.

Subsequently the defendant filed a petition for temporary support and other relief. That matter was set for hearing on petition and motion to dismiss the same, continuances taken, a motion for change of venue from the judge who

presided at the hearing of the cause on its merits was filed, and the matter was heard by another judge of the Seventh Judicial Circuit. The petition was allowed. Temporary support in the amount of $100.00 per month was ordered, together with attorney's fees. Notice of appeal and supersedeas bond were filed and approved. Subsequently a petition for a rule to show cause was filed and the matter was set for hearing, the defendant adjudged guilty of contempt for failure to make the payments as previously ordered, and another notice of appeal was filed. Thereafter, on motion of the plaintiff, an order was entered purporting to stay further proceedings pending the prosecution of the various appeals. Four judges participated in these proceedings at one stage or another.

We have taken with the case a motion by the appellee to dismiss the appeal by reason of the wilful refusal of the appellant to comply with the order to pay the support money and attorney's fees and the adjudication that he is in contempt of court. The motion to dismiss relies upon Laskey v. Laskey, 226 Ill. App. 566, and the general rules of equity. This case differs from Laskey only in that it was initiated by a complaint for annulment rather than a complaint for separate maintenance. In Laskey it was apparent that the noncompliance with the order for payment of fees and costs would preclude the appellee from representation in the Appellate Court. That

is not true in this case. While, in an appropriate case, a dismissal of the appeal may well be a proper remedy, in the face of this record, a dismissal could effect a substantial injustice and prolong the litigation. The motion to dismiss, therefore, is denied and the matter considered on its merits.

It is essentially the position of the plaintiff in this Court, as it was in the trial court, that the marriage of February 21, 1964, was the product of fraud and duress, that he is not the father of the child and that the marriage should be annulled.

This record establishes, and the plaintiff admits, the fact of the marriage. It is well-established that once a marriage is shown, the law raises a strong presumption in favor of its legality and the burden is on the party objecting to its validity to prove such facts and circumstances as establish its invalidity. Any evidence of an invalidating fact must be strong, distinct and conclusive. Crysler v. Crysler, 330 Ill. 74, 161 N.E. 97 (1928). I.L.P. Marriages sec. 39, and cases there cited. A careful search of the record in this case shows no evidence sufficient to meet that test.

No useful purpose would be served in detailing the conflicting testimony. Plaintiff's claim of fraud, duress and coercion finds no basis in this record except for his own testimony as to the state of his mind and his unspoken reservations

at the time of the marriage, together with the testimony of his mother relating to the events leading to the marriage. The latter, at most, indicate constant efforts by the defendant to resolve the difficult situation which to the plaintiff may have constituted harassment, but to the defendant would constitute efforts to see that the then yet unborn child would be legitimate.

A general statement of the rule applicable to this case is found in 35 Am. Jur., Marriage sec. 98, where it is stated:

> "... annulment will not be granted where the complainant has seduced the defendant and where his consent to the marriage, although reluctant, may be attributed to his feeling of remorse and sense of justice." (Footnote omitted.)

And in section 101 of the same work the following is found:

> "The claim of duress is frequently made where the family and friends of the victim of seduction bring pressure upon the seducer to repair the wrong done by him by marrying the woman, and it may safely be said that the courts do not readily grant relief in such a case even though the seducer consents to the marriage with the greatest reluctance. The courts recognize that the seducer has done no more than he ought to have done, and in case of doubt prefer to attribute his action to the better motives of remorse for the wrong done and to a sense of justice. Certainly, if the seducer through the fear of the natural and probable consequences of his conduct marries to escape them, there is not such duress as will avoid the marriage, in the absence of any force or direct threat of bodily harm at the time of the marriage."... (Footnote omitted.)

There is nothing in this record that approximates the proof of coercion or duress contemplated by this rule. See Smith v. Saum, 324 Ill. App. 299, 58 N.E.2d 248 (1944); Short v. Short, 265 Ill. App. 133.

Plaintiff attempted to prove he was not the father of the child by testimony relating to sperm tests, which testimony was, at best, conflicting. This testimony was objected to throughout the proceedings. We deem it unnecessary, now, to pass upon the admissibility of the tests but should note that, even based upon the tests and the medical testimony received in support thereof, this evidence was in conflict and not conclusive, and one of plaintiff's medical witnesses testified that it was probable that plaintiff could produce children.

The law indulges every presumption and charity in favor of the legitimacy of children. This presumption is not lightly to be repelled. People v. Powers, 340 Ill. App. 201, 91 N.E.2d 637 (1950). In the last-cited case is to be found a statement that the evidence for repelling such a presumption must be "conclusive." This record is devoid of any such evidence and, indeed, in our opinion, substantiates, rather than repels, the presumption.

Finally, it is the contention of the plaintiff that this action, being originally an annulment proceeding, was one

in which the court was lacking in authority to award temporary support and order the other payments called for in the decree. Arndt v. Arndt, 399 Ill. 490, 78 N.E.2d 272 (1948), is cited as authority for that proposition. As we view the Arndt case, there was no question, in that case, at the time of the appeal, of either separate maintenance or divorce and the limitations on the power of the trial court there discussed related solely to annulment.

In this case annulment and separate maintenance are the remedies sought. Separate maintenance being involved below and here, the provisions of paras. 22, et seq., of ch. 68, Ill.Rev.Stat.1965, would be applicable and, by reason of that, so would the provisions of section 15 of the Divorce Act (Ill.Rev.Stat.1965, para. 16, ch. 40). Thus, there is no question but that the trial court may enter an order or orders encompassing the relief here granted. Hoffman v. Hoffman, 316 Ill. 204, 147 N.E. 110 (1925); Smith v. Saum, supra.

Noncompliance with the subsequent orders for support and payment of attorney's fees and the other relief is sought to be excused on the basis that the filing and service of the notice of appeal divested the trial court of further jurisdiction. No contention is made that the orders are excessive or that the plaintiff is unable to comply. This

contention was disposed of in Smith v. Saum, supra at 305 (58 N.E.2d at 250), wherein the Court stated:

> "Counsel for plaintiff further contends that 'When notice of an appeal has been served and filed the cause is transferred to the Appellate Court and the trial Court has no jurisdiction to enter any orders.' We think this contention cannot be sustained. Hart v. Hart, 198 Ill. App. 555. In that case we held that section 15 /par. 167 of the Divorce Act, ch. 40, Ill. Rev. Stat. 1943 /Jones Ill. Stats. Ann. 109.1837, applied to suits to annul void or voidable marriages and it is the universal practice and in accordance with the law, for a trial judge in a proper case to award solicitors' fees and court costs to follow the appeal."...

Indeed, such orders will be sustained, if proper, even though the decree is reversed. Hoffman v. Hoffman, supra.

The circuit court was the trier of fact in this cause, heard the evidence, saw the witnesses and was in a much better position to judge their credibility than can this Court from the record, although it is voluminous. It is so well-established that citation is unnecessary that courts of review will not substitute their judgment on factual determinations for that of the trier of the fact unless the findings are manifestly against the weight of the evidence or are

palpably contrary to the evidence. The judgment of the circuit court of Sangamon County and the subsequent orders entered in pursuance thereof are affirmed.

Judgment affirmed.

TRAPP, P.J., and SMITH, J., concur.

50056

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
vs.	)	COURT OF COOK COUNTY,
FRANK E. BROWN, Defendant-Appellant.	)	CRIMINAL DIVISION.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a conviction of theft of an automobile by deception (Ill. Rev. Stat. 1963, chap. 38, par. 16-1(b), for which he was sentenced from two to four years in the penitentiary. The case was tried before the trial judge, a jury having been waived.

The defendant in his brief raised three points, (1) the indictment was fatally defective; (2) the State failed to prove beyond a reasonable doubt the identity of the defendant, or the value of the property, each an essential element of the offense charged, and (3) the evidence against the defendant was a product of an illegal search and seizure. On oral argument the defendant waived the point involving an alleged fatal defect in the indictment.

On April 21, 1964, the defendant was driving a car and was stopped by two police officers for making an improper right turn. Not having a valid driver's license, the defendant was arrested and searched. The defendant and Nicholas Brooks, a passenger in the automobile, were then taken to the police station. An investigation was made to determine whether the automobile had been stolen, but at that time the police found no indication that the car had been stolen, and it was taken to the police pound and held as prisoner property. At the time of the arrest the police made out a defendant's identification card which showed that he weighed 139 pounds and was 5' 7" tall. The defendant is light complexioned and has medium brown colored hair. Nicholas Brooks, the companion of the defendant, weighed between 180 and 185 pounds, was 5' 11" tall, had black hair and a dark complexion. On the day of the arrest,

Thomas McDonough, the owner of the automobile, reported to Officer Frank Paris that his automobile had been stolen. He described the man who took it as having black hair, a dark complexion, weighing 175 - 185 pounds and whose height was 5' 11". He also stated that this man asked for the complainant's car keys to test the motor of the automobile which the complainant was attempting to sell. Mr. McDonough, the complainant, testified that he gave the keys to this man in his barbershop, and that he had never seen this man before. The whole transaction took between one and one and a half minutes. The complaining witness gave a full description of the jacket and clothing worn by the man who obtained the keys. The automobile was on the property of a nearby gasoline filling station and had a "for sale" sign on it. Three days later, on April 24, 1964, Police Officer Paris visited the police pound and determined the car being held there in defendant's name belonged to Mr. McDonough. Mr. McDonough later went to the pound and identified the car as his property. The police informed Mr. McDonough that the two men who had been arrested in his car would be in court on May 11. On May 11 Mr. McDonough went to court to identify the man to whom he had given the car keys. At that time only the defendant and some police officers were before the bench. Nicholas Brooks, the other person in the car at the time of the arrest, had defaulted on his bond and was not there. The complainant then claimed the defendant was the man who had taken the car keys. During the trial the complainant testified that the man who had taken the car keys weighed about 185 pounds and was 5' 11" tall. He could not remember telling the police that the man had black hair or a dark complexion. He admitted, however, that the defendant was of light complexion and that his hair was medium brown.

Mr. Kowalski, the manager of the gasoline station where the complainant had been attempting to sell his car, testified that he saw the man who had taken the car and had a short conversation with him. Mr. Kowalski was 6' tall and weighed 140 pounds. While he was testifying the following questions were put to him and answers given:

> "MR. BASVIC: Do you remember me asking you this question, 'How tall would you say this man was?' And do you remember giving me this answer, 'About five foot ten to about six foot.' Do you remember telling me that?
>
> A Possibly, I'm not sure.
>
> Q Do you remember me asking you this question and you giving this answer,'How was he built?' And do you remember telling me. 'Heavier than myself.'
>
> A I think I did, but he was wearing a suit at the time, sports coat.
>
> Q Do you remember telling me that, 'He was bigger and huskier than me and I'm pretty tall,' do you remember that?
>
> A I was saying it looked like he was huskier than me but he was wearing a sportscoat at the time.
>
> Q How tall are you?
>
> A Six foot.
>
> Q How much do you weigh?
>
> A 140, 140 pounds.
>
> Q And he was huskier than you?
>
> A I'm not sure, it looked that way but he was wearing a sportscoat at the time."

This witness was unable to identify the defendant as the man who drove off with the car.

The defendant testified to the following:

He was never in the barbershop where the complaining witness, Thomas McDonough, was employed. He never saw Thomas McDonough in his life until he saw him in the police station and in court. He was never in the gasoline station at 4900 South Cicero Avenue in

his life. (This is the station where the car was standing bearing a "for sale" sign). He testified further that Nicholas Brooks was sitting next to him in the 1959 Pontiac at the time of their arrest. On April 21, 1964, Nicholas Brooks came to the apartment of the defendant's mother at about 5:30 P. M. April 21st is the date on which the car was taken from the gasoline station. Brooks formerly had owned a 1954 Oldsmobile. He took the defendant out to show him his new car which he said he had obtained by turning in his 1954 Oldsmobile on a trade for the 1959 Pontiac. They went out for a ride and the defendant was going to see his children whom he had not seen for two years. He and his wife had been separated for a number of years, and the children lived with his wife. During the course of the trip to see his children Brooks asked the defendant if he wanted to drive and he then took the wheel. After the defendant was stopped by the police and while they were on their way to the police station, Brooks gave the defendant the certificate of title to the car showing title in Thomas McDonough. The certificate had not been assigned by McDonough. The police officer claimed that the defendant, upon being stopped, told him that he had purchased the car from McDonough. The defendant denied having made that statement at the time of the arrest but admitted having made it when they got to the police station. During the ride from the place of arrest to the police station Brooks told the defendant that he, Brooks, had stolen the car, and had then given the certificate of title to the defendant. That was the first time the defendant knew that the car had been obtained by theft, and he gave as his reason for claiming ownership of the car, while at the police station, that he had several parole violations and that he knew once he entered the station they would find out about the warrant and "there was a previous poster out." He also testified that it wasn't

until he was on his way to the police station that he knew the car did not belong to Brooks.

In support of the defendant's argument that the State failed to prove beyond a reasonable doubt the identity of the defendant, or that the defendant was guilty beyond a reasonable doubt, he points to the discrepancy in the height, weight, color of hair and complexion given by the complaining witness to the police of the man to whom the complaining witness had given his car keys. On the day of the arrest the complaining witness had reported to the police that a man having black hair, a dark complexion, weighing 175 to 185 pounds, and whose height was 5' 11", had obtained the keys to the 1959 Pontiac from him. The defendant also argues that Nicholas Brooks, the passenger in the car at the time of the arrest, met this description exactly. He weighed between 180 and 185 pounds, was 5' 11" tall, had black hair and a dark complexion. It was also argued that the defendant, who was arrested on the same day as the car was taken, and who three days later was taken to the County Jail, where he was weighed on a scale and measured as to height, weighed only 139 pounds and was only 5' 7" tall; that he was light complexioned and had medium brown hair. The defendant also argues that the testimony of Mr. Kowalski, the manager of the gasoline station from where the car was taken, more or less coincided with the description of the man who took the car as that turned in to the police by the complaining witness. It is true that the complaining witness identified this defendant at the trial, but he also persisted in describing the defendant as a man who was 5' 11" tall and weighed as high as 185 pounds.

The defendant cites the case of People v. Barney, 60 Ill. App. 2d 79, 208 N.E.2d 378. In that case the defendant was described in an official report made by an Illinois State Narcotics Inspector as being about 26 years old, 5' 6" tall, 170 pounds in weight and with a stooped manner of walking. The same agent six months later made

another official report reciting that Barney was about 35 years old, 5' 11" tall, 210 to 220 pounds in weight and had an erect posture. The agent at the time of the trial definitely identified the defendant Barney. In that case the court said: "The differences in the description made less than six months apart are: an increase of nine years in age, of five inches in height, of fifty pounds in weight, and a change in posture from stooping to erect." The court then concluded that the identity of the defendant had not been proven beyond a reasonable doubt. In the case before us the complaining witness positively identified the defendant. On April 21, 1964, the complaining witness in his report to the police had described a man who was 4" taller than the defendant, 46 pounds heavier in weight than the defendant, was dark complexioned, whereas the defendant was light complexioned, and had black hair, whereas the deferdant had medium or light brown hair. The defendant argues that the man who obtained the keys from the complaining witness was Brooks, whom the description fitted, and not the defendant. This is somewhat supported, also, by the testimony of Kowalski, the manager of the gasoline station, and creates a reasonable doubt as to the identity of the guilty person. The State argues that the trial court as the trier of fact is peculiarly suited to determine questions of truthfulness, and a reviewing court will not readily substitute its own conclusion unless the proof is so unsatisfactory as to justify a reasonable doubt. People v. Woods, 26 Ill. 2d 582, 187 N.E.2d 692; People v. Means, 27 Ill. 2d 11, 187 N.E.2d 679.

The State also argues that it is the duty of a court in a bench trial to determine the credibility of all witnesses, and the weight to be given their testimony. People v. Reaves, 24 Ill. 2d 380, 183 N.E.2d 169. There is no doubt but what the pronouncement of law in those cases must be followed, however, where the proof is unsatis-

factory to such an extent that a reasonable doubt exists, a conviction cannot be sustained.

The court in this case, as we see it, did not give credence to material elements of the plaintiff's case, but, on the contrary, did give credence to the defendant's testimony as to matters which would tend to disprove the commission of a crime by the defendant. At the close of the case, in commenting on the evidence before finding the defendant guilty, the court said:

> "I believe the story he (defendant) tells about meeting Brooks, Brooks having told him he traded in a '54 Oldsmobile for a '59 Pontiac, how he got behind the wheel, how he was going up to see the youngsters, wanted to be sure the wife wasn't around and yet it was evening and he hadn't made any prior phone call to see if she would be there, minor matters but I believe a pattern of deception in lying on the part of the defendant, Brown. The story as to how he got control of the title from Brooks is completely incredible as is the story of his attempting to fix the policemen who stopped them, no basis for that at all. I had occasion to observe the defendant and observed his demeanor and I must state that I am of the opinion he lied, lied about material matters on the stand."

If the trial judge, as he stated, believed the defendant's story about the defendant meeting Brooks and that Brooks told him he traded in a '54 Oldsmobile for a '59 Pontiac, how he then got behind the wheel and was going up to see the youngsters, etc., we do not understand how he could find the defendant guilty. Implicit in these statements, which the court believed, is the fact that the judge must have believed that the defendant did not take the 1959 Pontiac, else why would he have believed the defendant when he stated that Brooks told him he traded in a 1954 Oldsmobile for a 1959 Pontiac. Also implicit in that statement was the finding that the defendant knew nothing about the 1959 Pontiac, which was the subject of the theft, until he saw it in front of his mother's home after Brooks had driven it to that location. The judge found that he could not

believe the defendant's story as to how he got control of the title from Brooks. The defendant was not being tried for theft of title by deception; he had been indicted for theft of an automobile by deception.

For the foregoing reasons we feel that we must reverse the judgment of conviction.

JUDGMENT REVERSED.

SCHWARTZ and DEMPSEY, JJ. concur.